IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-478

THE ALMA SOCIETY, INC., et al.,
Petitioners,

v.

IRVING MELLON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ATTORNEY GENERAL'S BRIEF IN OPPOSITION

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Preliminary Statement

The petitioners seek a writ of certiorari from this Court to review an order of the United States Circuit Court of Appeals for the Second Circuit which unanimously affirmed the judgment of the United States District Court for the Southern District of New York dismissing the petitioner's action. It was held below that the New York State statutory scheme with regard to the sealing of adoption records did not abridge the petitioner's constitutional rights. While petitioners alleged in the Courts below that

New York law requiring the confidentiality of adoption records violated the First, Fourth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, petitioners have abandoned all but the Thirteenth Amendment claim.

Question Presented

Does the requirement of showing good cause for access to one's adoption record violate petitioners' rights under the Thirteenth Amendment?

Jurisdiction

The petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 601 F.2d 1225 (Petitioners' Appendix A). The opinion of the District Court for the Southern District of New York is published at 495 F. Supp. 912. (Petitioners' Appendix C).

Statement of the Case

The facts of the case are presented in the opinions of the Courts below, 601 F.2d at 1225, 1227-30; 459 F. Supp. at 914.

Statutes Involved

New York Domestic Relations Law § 114 (Petitioners' Appendix A at 4a, n.1); New York Public Health Law § 4138 (Petitioners' Appendix A at 4a, n.1); New York Social Services Law § 372 (Petitioners' Appendix A at 4a, n.1); New York City Administrative Code § 567-2.0 (Petitioners' Appendix D at 46a).

POINT I

Requiring good cause before allowing access to confidential adoption records is neither slavery, nor a badge or incident of slavery.

The petitioners would have this Court declare violative of the Thirteenth Amendment sections of the New York Statutes which require that adoption records within the State be sealed except where a court, upon a showing of good cause, finds that there is a basis for unsealing those records.

Based solely on the Thirteenth Amendment, petitioners contend that they have an absolute right to see their adoption records *in toto,* including the names of their natural parents.

Petitioners would have this Court hold that any requirement that they establish good cause before gaining access to their records violates the Thirteenth Amendment of the United States Constitution prohibiting slavery and involuntary servitude as such statutory schemes, in effect, makes the petitioners "slaves".

Section one of the Thirteenth Amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and Section two empowers Congress to enforce the Thirteenth Amendment by appropriate legislation. Section one is self-executing. As the Court in *The Civil Rights Cases,* 109 U.S. 3, 20 (1883) declared:

> "By its own unaided force and effect it abolished slavery, and established universal freedom."

Section two, however, requires Congressional action. *Palmer* v. *Dixon,* 403 U.S. 217, 227 (1971); *Jones* v. *Alfred H. Mayer & Co.,* 392 U.S. 409, 440 (1968).

As Congress has never prohibited the sealing of adoption records, petitioners are forced to base their challenge on Section one of the Thirteenth Amendment. Stripped of its rhetoric, the petition alleges that either: (1) the confidentiality of adoption records is "slavery" or (2) such confidentiality is a "badge" or "necessary incident of slavery" prohibited, without any Congressional action, by the Thirteenth Amendment. The first proposition is fallacious and the second proposition is contrary to the intentions of the framers of the Thirteenth Amendment, and contrary to the settled decisions of this Court.

The scope of the term "slavery" as used in the Thirteenth Amendment is "very distinct". *The Civil Rights Cases, supra* at 22. This Court has consistently defined slavery as the "subjugation of one man to another" (*The Civil Rights Cases, supra* at 24); "forbid[ding] one man from owning another as property". (*id.* at 34 Harlan, J. dissenting).

> "The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery." *Id.* at 24.

Providing for the confidentiality of adoption records has nothing to do with slavery. The lack of knowledge of who one's natural parents are can in no way be compared to the subjugation of one man to another.

Petitioners allege that because they never consented to confidentiality, it would be "slavery" to require them to show good cause. This argument would apply to, and nullify, much of the State's adoption laws. If adult adoptees can void the confidentiality provision of DRL § 114, they can void the inheritance provisions of DRL § 117. Minors could challenge the provisions of DRL

§ 117, which relieve the natural parents of their responsibilities to the child.

Petitioners' argument ignores the numerous instances when judicial decisions bind minors, even after the minors attain adulthood. The question raised is one of due process, not slavery. New York law satisfies the requirement of due process.

In New York State, adoption requires a judicial proceeding and can be authorized only if it is in the best interests of the child. DRL § 114. Before entering an order of adoption, the judge must order an independent investigation to be made of the propriety of the adoption. DRL § 112(7), 116.4. This would appear sufficient to answer any allegation that an adoptee was a "slave".

Nor is the confidentiality of adoption records a badge or incident of slavery. In 1883, this Court enumerated the "necessary incidents of slavery".

> "Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution." *The Civil Rights Cases, supra,* at 22.

This description remains equally valid today. *Jones* v. *Alfred H. Mayer & Co.,* 392 U.S. 409, 440 (1968).

Petitioners allege that New York Law involuntarily separates the natural parents from their children. This enforced separation is referred to as the second incident of slavery prohibited by the Thirteenth Amendment. (Petitioners' Brief at 16-17). As the Court below properly held, it is adoption that terminates the natural family and creates a new adoptive family. *ALMA* v. *Mellon,* 601 F.2d at 1238 (Petitioners' Brief at 28a). This occurs when the natural parents are unable or unwilling to care for their

children. Social Services Law § 384-b. As counsel for the Children's Aid Society and Louise Wise Services point out, the adoption process is the antithesis of slavery. (Joint Brief of The Children's Aid Society and Louise Wise Services at 7).

POINT II

The Thirteenth Amendment, by itself, does not abolish the badges or incidents of slavery.

The eradication of slavery "not simply the institution, but of its badges and incidents" was left to Congress. *The Civil Rights Cases, supra,* at 35 (Harlan, J. dissenting). Even Congress' authority to legislate in this area is not absolute, but is limited to matters rationally related to slavery. *United States* v. *Harris,* 106 U.S. 629, 643 (1882). Whether Congress has the authority under the Thirteenth Amendment to prohibit the confidentiality of adoption records, a matter of particular state concern, is doubtful, given the lack of rational connection between adoption records and slavery.

It is clear, however, that in the absence of Congressional action, the Thirteenth Amendment, by itself, does not eliminate the badges and incidents of slavery. The legislative history of the Thirteenth Amendment establishes that the framers of the Thirteenth Amendment intended to grant the national government the power to enforce the abolition of slavery throughout the nation. tenBroeck, "Thirteenth Amendment to the Constitution—Consummation to Abolition and Key to the Fourteenth Amendment", 39 Cal. L. Rev. 171, 183 (1951); Buchanan, "Legal History of the Thirteenth Amendment", 12 Houston L. Rev. 1, 7-14 (1974). Foes of the Thirteenth Amendment objected to the Thirteenth Amendment's broad grant of authority *to Congress* to pass legislation eliminating discriminatory laws. Both sides understood that the first

clause, *per se,* did not invalidate discriminatory laws not involving the direct subjugation of one person by another.

Thus, Congress felt compelled to prohibit various courses of conduct that were associated with slavery, although not slavery itself. Congress passed the Civil Rights Bill of 1866 (Act of April 19, 1866, ch. 31, 14 Stat. 27) and the Freedmen's Bureau Act (Act of July 16, 1866, ch. 200, 14 Stat. 173). Congress was still concerned that these bills went beyond its power under the Thirteenth Amendment, and initiated the passage of the Fourteenth Amendment. Note, "Developments—Equal Protection", 82 Harv. L. Rev. 1065, 1068 (1969). Foremost among the badges of slavery that Congress sought to eliminate was the unequal protection of the laws. Buchanan, *supra,* at 18. Far from believing that the Thirteenth Amendment eliminated this incident of slavery, Congress did not even feel assured that it could prohibit such conduct, which formed the impetus for the passage of the Fourteenth Amendment, Note, *supra,* 82 Harv. L. Rev. at 1068. More recent Congressional legislation, such as the Civil Rights Act of 1964, 78 Stat. 243 (42 U.S.C. § 2000 *et seq.*) and Title VIII of the Civil Rights Act of 1968, 82 Stat. 81 (42 U.S.C. § 3601 *et seq.*) is further proof that the Thirteenth Amendment, in and of itself, did not abolish all vestiges of slavery.

Every decision by this Court since the Reconstruction Era has accepted this view. No decision has accepted the view of the Thirteenth Amendment espoused by petitioners.

In *Jones* v. *Alfred H. Mayer & Co.,* 392 U.S. 409 (1968), the Court upheld the constitutionality of 42 U.S.C. § 1982 prohibiting discrimination in the purchase and sale of property. While not deciding what was the scope of the self-executing aspect of the Thirteenth Amendment, this Court did not believe it struck down this basic incident of slavery, but rather that it authorized Congress to prohibit such discrimination. *Id.* at 441.

In *Griffin* v. *Breckinridge,* 403 U.S. 88 (1971), this Court upheld another statute passed during the reconstruction era, 42 U.S.C. § 1985(3), protecting the right to travel. Once again, protection of this badge of slavery was found in Congressional action, and not in the self-executing aspect of the Thirteenth Amendment.

> "By the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free. To keep that promise, 'Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.' *Jones* v. *Alfred H. Mayer & Co., supra* at 440." *Id.* at 105.

In *Palmer* v. *Thompson,* 403 U.S. 217 (1971), decided one week after the *Griffin* decision, this Court explicitly held that the self-executing force of the Thirteenth Amendment would be strictly limited.

In *Palmer,* the city of Jacksonville was required to integrate certain recreational facilities that were originally segregated. While it integrated many, the city decided that it could not safely and economically run its public swimming pools on an integrated basis, and closed them. Petitioners, black citizens of the city, challenged this action as a violation of the Thirteenth and Fourteenth Amendments. The Court held that closing the pools did not violate the Fourteenth Amendment.

The Court then considered whether the self-executing section of the Thirteenth Amendment prohibited the city from closing its pools.

> "The argument runs this way:
>
> The first Mr. Justice Harlan's dissent in *Plessy* v. *Ferguson,* 163 U.S. 537, 552 (1896), argued strongly

> that the purpose of the Thirteenth Amendment was not only to outlaw slavery but also all of its 'badges and incidents'. This broad reading of the amendment was affirmed in *Jones* v. *Alfred H. Mayer & Co.,* 392 U.S. 409 (1968). The denial of the right of Negroes to swim in pools with white people is said to be a 'badge or incident' of slavery. Consequently, the argument seems to run, this Court should declare that the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment."

Characterizing the argument as "faint" and "unpersuasive", this Court summarily rejected it.

> "To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history. Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a lawmaking power far beyond the imagination of the amendment's authors."

Reversing *Palmer* would mean that all of Congress' actions since 1866, were redundant. The Fourteenth Amendment, itself would be redundant. Moreover, it would have broad implications on social relations, since the Thirteenth Amendment affects private action as well as State action. *Jones* v. *Alfred H. Mayer & Co., supra* at 438: *The Civil Rights Cases, supra* at 23. If petitioners' arguments were accepted, this Court would be authorizing any child to sue his parents for his family history in federal court as a deprivation of his federally secured rights under 42 U.S.C. § 1983, and 28 U.S.C. § 1343(4). A child could sue his parents for his parents' medical history. This radical reorganization of social relationships has no basis in the Thirteenth Amendment.

The self-executing clause of the Thirteenth Amendment is limited to eradicating a status—slavery. That is all it did. It was left to Congress to eradicate all the elements of slavery. Even in 1968, Justice Douglas felt compelled to write, "Some badges of slavery remain today". *Jones* v. *Alfred H. Mayer & Co., supra* at 445 (DOUGLAS, J. concurring).

The framers of the Thirteenth Amendment believed that this amendment created the power to reorder social relationships in the country. But they left it to Congress to determine how far reaching that reordering should be. Even Congress is not unlimited in deciding what the badges of slavery are. *U.S.* v. *Harris*, 106 U.S. 629 (1882). Petitioners' attempt to rewrite history and the law should be rejected.

CONCLUSION

The petition for certiorari should be denied.

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November 19, 1979.

Respectfully submitted,

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